

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 33

Docket No. AT-0731-09-0240-I-1

**Jenee Ella Hunt-O'Neal,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

March 4, 2011

Kristin D. Alden, Esquire, Washington, D.C., for the appellant.

Robert J. Girouard, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed the decision of the Office of Personnel Management (OPM) to direct her removal pursuant to 5 C.F.R. part 731. For the reasons set forth below, we DENY the appellant's petition, REOPEN the case on the Board's own motion under [5 C.F.R. § 1201.118](#), and REMAND the case for further adjudication.

BACKGROUND

¶2 The appellant was employed by the Internal Revenue Service (IRS) as a Contact Representative, GS-05, under a career-conditional appointment subject to

a 1-year probationary period. Initial Appeal File (IAF), Tab 9, Subtab 2n. The Standard Form (SF) 50 recording her appointment indicates an effective date of January 7, 2008. *Id.* By letter dated December 30, 2008, OPM informed the appellant that, pursuant to 5 C.F.R. part 731, it had found her unsuitable for any covered position¹ in the Federal service based on charges of misconduct or negligence in her prior employment and making material, intentional false statements on several forms submitted in connection with her application for and appointment to the Contact Representative position. *Id.*, Subtab 2c. OPM further informed the appellant that it had taken the following actions: (1) directed the IRS to remove her from the rolls within 5 days of receipt of its decision; (2) cancelled any reinstatement eligibility obtained from her appointment or any other eligibilities she may have had for covered positions; and (3) debarred her from competition for, or appointment to, any covered position for a period of 3 years. *Id.* The SF-50 recording her removal indicates an effective date of January 5, 2009. *Id.*, Subtab 2a.

¶3 On January 7, 2009, the appellant filed the instant appeal.² IAF, Tab 1. Following a hearing, the administrative judge sustained both charges and affirmed OPM's suitability decision. IAF, Tab 15 (Initial Decision, Sept. 11, 2009). The administrative judge did not review the propriety of the suitability actions themselves, citing *Folio v. Department of Homeland Security*, [402 F.3d 1350](#), 1353-55 (Fed Cir. 2005), for the proposition that the Board's review of a suitability determination includes an evaluation of the criteria set forth in [5 C.F.R. § 731.202](#), but does not extend to the ultimate action taken by OPM.

¹ Title [5 C.F.R. § 731.101](#)(b) defines a "covered position" as "a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the Senior Executive Service."

² The regional office initially identified the Department of the Treasury as the respondent agency, but subsequently corrected that error. *See* IAF, Tabs 2-4.

Initial Decision at 2-3. On September 23, 2009, the appellant petitioned for review of the initial decision, contesting the administrative judge's findings with respect to the charges. Petition for Review File (PFR File), Tab 1.

¶4 Meanwhile, on October 7, 2009, OPM moved for the Board to reopen the cases of *Aguzie v. Office of Personnel Management*, MSPB Docket No. DC-0731-09-0261-R-1, and *Barnes v. Office of Personnel Management*, MSPB Docket No. DC-0731-09-0260-R-1. The Board had previously remanded *Aguzie* and *Barnes* to obtain briefing on the question of whether, when OPM directs the removal of a tenured employee under [5 U.S.C. § 7511](#)(a)(1) for suitability reasons pursuant to 5 C.F.R. part 731, the removal action is subject to the requirements of 5 U.S.C. chapter 75, subchapter II, including the statutory grant of appeal rights at [5 U.S.C. § 7513](#)(d). *Aguzie v. Office of Personnel Management*, [112 M.S.P.R. 276](#) (2009) (*Aguzie I*); *Barnes v. Office of Personnel Management*, [112 M.S.P.R. 273](#) (2009). By order dated October 15, 2009, the Board granted OPM's motion and consolidated the two cases for briefing of the issue before the full Board. That same day, the Board added a third case, *Scott v. Office of Personnel Management*, MSPB Docket No. CH-0731-09-0578-I-1, to the consolidated appeal.

¶5 On October 20, 2009, OPM - apparently unaware that the Board had already granted its motion to reopen *Aguzie* and *Barnes* - requested an extension of time to respond to the appellant's petition for review pending a ruling on that motion. PFR File, Tab 3. The Board acknowledged OPM's request and added the instant appeal to the consolidation. PFR File, Tab 4. However, in its December 7, 2009 brief, OPM objected to the consolidation order, arguing that the appellant, unlike Mr. Aguzie, Ms. Barnes, and Mr. Scott, had served less than 1 year and did not satisfy the definition of an employee at [5 U.S.C. § 7511](#)(a)(1). PFR File, Tab 8.

¶6 The Board identified the question raised in *Aguzie I* and *Barnes* for oral argument and issued a Federal Register notice soliciting amicus briefs. 75 Fed.

Reg. 20,007 (Apr. 16, 2010); 75 Fed. Reg. 29,366 (May 25, 2010) (extending filing deadline). In addition, the Board obtained pro bono counsel for the appellant, who had been proceeding pro se. PFR File, Tab 19. The appellant's counsel filed a brief on her behalf on July 19, 2010, addressing the issue identified for oral argument, as well as OPM's objection to the consolidation. PFR File, Tab 20. OPM filed a supplemental brief in response. PFR File, Tab 27. The Board held oral argument on October 18, 2010.³

¶7 On January 26, 2011, the Board severed *Scott* and the instant appeal from the consolidation, and issued its decision in *Aguzie v. Office of Personnel Management*, 2011 MSPB 10 (*Aguzie II*), finding that an OPM-directed suitability removal of a tenured employee is appealable under [5 U.S.C. § 7513\(d\)](#), and subject to the “efficiency of the service” standard of 5 U.S.C. § 7513(a).

ANALYSIS

¶8 Having decided the issue at stake in *Aguzie II*, we now address the issues unique to this appeal. As an initial matter, we discern no error in the administrative judge's finding that OPM proved the charges against the appellant by a preponderance of the evidence. Because we find the appellant's original petition for review does not introduce any new or material evidence or identify any legal error in the initial decision that affects the outcome, we deny it. See [5 C.F.R. § 1201.115](#).

¶9 We find, however, that further adjudication is necessary in light of our decision in *Aguzie II*. Specifically, we must determine whether the appellant satisfied the definition of an employee under [5 U.S.C. § 7511\(a\)\(1\)](#) at the time of her removal. If not, then the appeal lies within the Board's jurisdiction solely under [5 C.F.R. § 731.501](#), and the administrative judge correctly refrained from

³ We give special thanks to Kristin Alden, Esq., for providing pro bono representation for Ms. Hunt-O'Neal.

considering whether the suitability actions were reasonable in light of the sustained charges. *See Folio*, 402 F.3d at 1353-55.⁴ In that event, we discern no basis for disturbing the initial decision. If, however, the appellant was an employee under [5 U.S.C. § 7511\(a\)\(1\)](#), then the removal action, as well as the debarment and cancellation of eligibilities, lie within the Board's jurisdiction under [5 U.S.C. § 7513\(d\)](#), and must be adjudicated under the standards and procedures applicable to adverse actions under 5 U.S.C. chapter 75, subchapter II, including review of the penalty under *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#) (1981). *See Aguzie II*, 2011 MSPB 10, ¶¶ 31-35.

¶10 The term “employee,” for purposes of 5 U.S.C. chapter 75, subchapter II, includes an individual in the competitive service who is not serving a probationary or trial period under an initial appointment, or who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#); *see McCormick v. Department of the Air Force*, [307 F.3d 1339](#), 1341-42 (Fed. Cir. 2002). The

⁴ OPM's suitability regulations, as revised effective June 15, 2008, now state that it is the “suitability action” which may be appealed to the Board. [5 C.F.R. § 731.501\(a\)](#). In *Aguzie I* and *Barnes*, we raised the question of whether that revision altered the scope of the Board's regulatory jurisdiction, thereby superseding *Folio*. *See Aguzie I*, [112 M.S.P.R. 276](#), ¶¶ 1 n.1, 7; *Barnes*, [112 M.S.P.R. 273](#), ¶ 6. On reconsideration, OPM contended that the revision was not intended to expand the Board's review authority beyond the merits of the underlying suitability determination. *See Aguzie II*, 2011 MSPB 10, ¶ 3 n.3. To our knowledge, OPM had not previously spoken to the issue, and we owe no deference to its post hoc litigation position. *See Garza v. Office of Personnel Management*, [83 M.S.P.R. 336](#), ¶ 12 (1999). Nevertheless, we find that the interpretation advanced by OPM's counsel is consistent with the language of the revised regulation, and that *Folio* remains good law. While [5 C.F.R. § 731.501](#) does not expressly state that the Board must affirm a suitability action when it sustains all of the charges, it provides that when the Board sustains fewer than all of the charges, it must remand the case to OPM or the employing agency to determine whether the suitability action taken is appropriate based on the sustained charge or charges. [5 C.F.R. § 731.501\(b\)\(2\)](#). To find that the Board has authority to review the reasonableness of a suitability action when it sustains all charges, but not when it sustains fewer than all charges, would be an inexplicable result, and the language of the regulation does not compel such a reading. *Cf. Hunt v. Office of Personnel Management*, [89 M.S.P.R. 449](#), ¶ 14 (2001) (declining to follow OPM's interpretation of its regulation at 5 C.F.R. § 838.302 where doing so would produce an absurd result).

SF-50s indicate that the appellant was removed 1 day before she would have attained employee status. *See* IAF, Tab 9, Subtabs 2a, 2n. However, while an executed SF-50 is the customary documentation for a personnel action, it does not constitute the personnel action itself, and does not on its face control an employee's status and rights. *Grigsby v. Department of Commerce*, [729 F.2d 772](#), 774-76 (Fed. Cir. 1984); *Scott v. Department of the Air Force*, [113 M.S.P.R. 434](#), ¶ 8 (2010); *Scott v. Department of the Navy*, [8 M.S.P.R. 282](#), 287 (1981). Rather, we must look to the totality of the circumstances to determine the actual dates of the appellant's appointment and removal. *See Scott*, [113 M.S.P.R. 434](#), ¶ 8; *Scott*, 8 M.S.P.R. at 287. Because the appellant was not on notice below that her removal might be appealable under [5 U.S.C. § 7513\(d\)](#), she did not have the opportunity to present evidence showing that, contrary to the dates given on her SF-50s, she was a tenured employee at the time of her removal. *See Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). Accordingly, we remand the case to provide her an opportunity to present such evidence.

¶11 We further note that, if the appellant satisfies the definition of employee at [5 U.S.C. § 7511\(a\)\(1\)](#), she is presumably also an employee for purposes of 5 C.F.R. part 731. *See* [5 C.F.R. § 731.101\(b\)](#) (defining "employee" as "a person who has completed the first year of a subject-to-investigation appointment"). OPM's suitability regulations provide that OPM may take or direct suitability actions against an employee based on only the following charges: material, intentional false statement, or deception or fraud in examination or appointment; refusal to furnish testimony as required by [5 C.F.R. § 5.4](#); or a statutory or regulatory bar which prevents the person's lawful employment. [5 C.F.R. §§ 731.105\(d\)](#), 731.203(d). Hence, if the appellant was an employee as defined at [5 C.F.R. § 731.101\(b\)](#), then OPM exceeded its regulatory authority insofar as it based its suitability actions on a charge of misconduct or negligence in

employment. Accordingly, should the administrative judge determine on remand that the appellant was an employee under both [5 U.S.C. § 7511](#)(a)(1) and 5 C.F.R. § 731.101(b), he shall evaluate the reasonableness of the suitability actions based solely on the charge of material, intentional false statement, or deception or fraud in examination or appointment.

ORDER

¶12 We REMAND this case to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.